United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1044

To be argued by
MELVIN D. KRAFT

Brs

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

LEON MAYER,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT LEON MAYER

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UNITED STATES OF AMERICA,

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- against - Docket No. 77-1044

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REPLY BRIEF OF DEFENDANT-
APPELLANT LEON MAYER

INTRODUCTION

The government's brief fails to set out a single cogent, practical answer to any branch of Mayer's three-pronged contention that the government was not ready for trial in October, 1975. Instead, the Court is presented with an array of debating points which sound superficially attractive, but, upon analysis, are found to have no real applicability to the unique facts of this case.

FACTS

Before turning to the substance of the government's arguments, a brief corrective statement must be made in answer to the one-sided, distorted version of the trial and pre-trial motions contained in the government's brief.

Typical of such distortion is the government's handling, [G. Br., 9] of the inability of a key witness, Leon Rafalowicz, to identify defendant Mayer as the man to whom he had allegedly turned over a $20,000.00 secret commission [R 96, pp. 105, 106]*. In a barefaced attempt to paper over this major weakness in its case, the government suggests that Alan Kluger, defendant Mayer's former employer, had equal difficulty recognizing defendant Mayer, who had recently grown a moustache [R 96, p.33]. A comparison, however, of these two passages from the transcripts, shows that Kluger responded to the prosecutor's request by identifying defendant Mayer, both verbally and by pointing. Only after so identifying defendant Mayer did Kluger comment, offhandedly, "I didn't recognize him with the moustache." By contrast, Rafalowicz was unable to identify Mayer (seated, at the time, next to Mayer's counsel at the defense table) even after being allowed to step down from the stand and wander about the courtroom, and after having been suggestively questioned twice by the prosecutor as to whether defendant Mayer had a moustache.

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* The following abbreviations will be used with page numbers throughout this brief to designate portions of the record, appendix, and briefs referred to. "D. App." refers to defendant Mayer's appendix. "G. App." refers to the government's appendix. "G. Br." refers to the government's brief. "D. Br." refers to appellant Mayer's brief. "R" refers to the record on appeal.

A further example of such distortion is found in the government's statement [G. Br. 21, footnote], that the exhibits at the Mayer trial were only a "small fraction" of the six drawers of documents disclosed to Mayer. The government's argument only em phasizes the needle-in-the-haystack exercise which confronted Mayer's counsel when this avalanche of documents was finally made available.

The contention of the government that "many" of the 2300 pages of documents requested by Mayer were repetitive SEC filings is both erroneous and misleading. Such documents, even by the most generous of estimates, comprised no more than five percent of the documents requested.

In the sprawling, two-page footnote beginning on page 24 of the government's brief, this distortion continues, as the government tries to explain away Mayer's showing of prejudice, a showing which we maintain is unnecessary here. The government, which had withheld documents for more than a year, brashly points an accusing finger at Mayer's counsel for being unable to schedule an inspection of documents for eight days, but then shrugs off as negligible the fact that some sixteen hours were required simply to sift through these documents to determine which would require further study. Nor is the government's tidy categorization of its 331 proposed trial exhibits as various "routine forms" [G. B. 25] fair or candid. The government masks the complex puzzle presented by these documents, the transactions they reflected and the host of dates, facts, and names they contained which required extensive investi-

gation, study, and cross-referencing.

In the same footnote [G. Br. 25], the government also attempts to explain away the hardship caused by its withholding of the Joseph Lichtman notes, emphasizing that the notes were received three weeks earlier than required by statute. In so arguing, the government fails to mention that prosecutor MacDonald had promised to provide these notes more than a year earlier, in order to induce Mayer's counsel to withdraw his discovery motion [D. App.53], and makes the ridiculous suggestion that its own summary of the Lichtman notes could make up for defendant's lack of an adequate opportunity to review, cross-check, and investigate the matters referred to in those handwritten, difficult-to-decipher notes.

At the conclusion of this footnote the government contends that the dilemma and hardship faced by Mayer and his counsel as a result of the government's flagrant default in discovery is "greatly overstated". But the government does not, and cannot, deny that counsel for Mayer clearly apprised the trial court of the dilemma.

Indeed, the government appears to have overlooked the statement of Mayer's counsel on this matter during the trial:

> Your Honor, there isn't any problem that I have in the preparation of the defense of this case that could not, that would exist today if when Mr. Timbers turned over the discovery materials to me that he did in May he had turned over to me at that time the material that I saw for the first time

> on October 27th. The fact is that from October 27th until this day I have worked 15 hours a day, 7 days a week; my family has not seen me, this has been one of the greatest personal hardships of my life, and I would never try another case in this court if I have to go through this again.
>
> [R 96, page 528].

These are the brutal facts which all of the government's rhetoric cannot erase from the record of this appeal.

ARGUMENT*

POINT I

THE GOVERNMENT'S READINESS FOR TRIAL SHOULD BE JUDGED BY THE READINESS FOR TRIAL OF ASSISTANT BANNIGAN

The government, at page 20 of its brief, argues that the fulfillment of the government's obligation to be ready for trial is not to be judged in terms of the preparedness of Assistant Bannigan, the prosecutor who was assigned responsibility for trying the case, but, instead, should be found satisfied if anywhere within the office of the United States Attorney some person or persons exist who are, in theory, sufficiently familiar with the case to try it. To complete this absurdity, the government points to Assistant MacDonald as sufficiently familiar with the case, and asserts that "if necessary, he could have tried it." There is nothing in the record, however, to indicate that Assistant MacDonald was available to try the case "if necessary", as the government now so blithely speculates and assumes. Indeed, it is the opposite assumption which is nearest to reality; Assistant MacDonald was taken off this

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* This reply brief will respond seriatim and under separate headings to the points raised in the government brief rather than adopting the government's approach of responding to all points under a single heading and out of sequence.

case to handle trials and investigations in other pressing, important cases.** No attorney can prepare and try two cases at one time.

The indisputable fact of the matter is that when the government's time to be ready for trial ran out, i.e., in October, 1975, Assistant MacDonald was engaged in another case (or cases), and the responsibility for having this case ready for trying rested as a practical matter solely with Assistant Bannigan. It is his name which appears on the government's notice of readiness [D. App. 34]. It is his readiness, or lack of readiness, for trial, in realistic terms, by which the government's preparedness for trial must be decided. The government brief, by clear implication, admits that he was not ready to try this case.

**Assistant MacDonald's new assignment is not part of the record, but it is our belief that, upon being relieved of responsibility for this case, he was assigned first to try United States v. Boyd and upon the completion of that trial, to head the investigation in United States v. Stirling-Homex.

POINT II

THE FILING OF A NOTICE OF READINESS DOES NOT BAR INQUIRY INTO THE GOVERNMENT'S ACTUAL STATE OF TRIAL READINESS

Recognizing its inability to defend Assistant Bannigan's readiness for trial, the government retreats, at pages 21 and 22 of its brief, to an argument that there should be no inquiry into the government's actual state of readiness once a notice of readiness has been filed and that the government's actual readiness can be tested only by the Court's calling of the case for trial.

In taking this position the government is, as a practical matter, asserting that it need not be ready for trial within six months as long as it files a notice of readiness and is actually ready whenever the Court decides to call the case for trial. This attitude is echoed in the wording of the government's notice of readiness, which states:

> "the United States will be ready for trial as soon as the matter can be reached by the Court."
>
> [D. App. 34]

Rule 5, however, requires that the government "must be ready for trial within six months", not that the government promise, within six months, to be ready for trial at some future date. Contrary to the government's suggestion that the filing of a notice

of readiness should be both the beginning and end point of any inquiry as to trial readiness, the courts have shown themselves willing to disregard such a notice of readiness and inquire into the government's actual state of preparedness where the government's representation of readiness is challenged: United States v. Reingold, 384 F. Supp. 464 (W.D.N.Y. 1974), (government's notice of readiness held "meaningless" and indictment dismissed); United States v. Blauner, 337 F. Supp. 1383 (S.D.N.Y. 1971), (government's notices of readiness held "meaningless pieces of paper" and indictments dismissed); United States v. Valot, 473 F.2d 667 (2d Cir. 1973), (case remanded for further hearing on facts where government's notice of readiness had been filed within the six-month period). The government's filing of a notice of readiness within the six-month period is clearly no bar to an inquiry into the government's actual state of trial readiness; nor is the alleged presence of "thorny issues" of the very type dealt with in the above cases [G. Br. 21].

POINT III

THE GOVERNMENT NEVER PROVIDED AN ADEQUATE BILL OF PARTICULARS IN RESPONSE TO DEFENDANT MAYER'S MOTION, DESPITE MAYER'S EFFORT TO OBTAIN SAME

At pages 22 and 23 of its brief, the government makes three points with regard to Mayer's motion for a bill of particulars, namely that; (1) the bill of particulars served by the government in October, 1975 was an adequate response to Mayer's motion for particulars; (2) Mayer's contention that he did not receive a bill of particulars responsive to his request is not consistent with his past conduct, and (3) Mayer's counsel slept on his rights rather than pressing for the particulars sought by his motion. There is no solid or sensible support on the record for any of these points.

(1) The Government's Bill Was Not Responsive to Mayer's Demands.

A side-by-side comparison between the demand for particulars which was the subject of Mayer's motion [D. App. 126], and the government's bill of particulars [D. App. 129], reveals that the government's bill was framed in a manner substantially unresponsive to Mayer's demand. Preliminarily, we point out that the very necessity of a "chart", such as that presented by the

government [G. App. 3(a)] to explicate the convoluted manner in which the government's bill "responds" to Mayer's demand is indicative of the highly tortured argument being made by the government here.

Mayer's demands numbered 2, 5, 11, and 12 are admitted by the government to have been left unanswered [G. App., 3a] (and for more than seven months unobjected to).

Mayer's demand number 1 [D. App., 126, ¶1] is partially answered by paragraph one of the government's bill, [D. App., 129, ¶1] but the request for addresses was neither answered nor objected to.

Mayer's demands numbered 3 and 4 [D. App., 126, ¶¶3,4] were among those which the District Judge found the government had answered [D. App. 139-140]. Demand number 3, [D. App. 126, ¶3] which seeks "the manner in which defendant Mayer is alleged to have falsified purchases of Minute Approved Credit Stock" is purportedly answered, under the "chart" [G. App. 3a], by paragraphs 3(g) and (h) of the government's bill [D. App. 131, ¶¶g, h]. When examined, however, these paragraphs are not responsive to this vital demand for particulars. Paragraph 3(h) concerns Joseph Lichtman, not defendant Mayer. Paragraph 3(g) simply states that the defendants, including Mayer, failed to disclose that the defendants and others

had falsified purchases, and sheds no light whatsoever on the manner in which that falsification of purchases was carried out. The method by which the shares were sold to dummy purchasers was the heart of the government's case against Mayer, and the government's failure and refusal to provide any particulars on this subject kept defendant Mayer in the dark as to even the broad outlines of the government's case until late October, 1976 when the government disgorged the final mass of discovery material.

The purported answer to Mayer's demand number 4 [D. App. 126, ¶4] refers to a meeting in a different year than that specified in Mayer's demand and the indictment [D. App. 129, ¶2.1].

Information sought in Mayer's demands numbered 6, 8 and 9 [D. App. 126, 127, ¶¶6,8,9] was conceded by defendant's counsel to have been substantially disclosed by paragraph 3 of the government's bill of particulars [D. App. 130, 131], and was not pressed for by defendant's counsel [G. App. 6a, 7a].

Mayer's demands 7 and 10 [D. App. 126, 127, ¶¶7,10] (also found by the District Judge to have been answered by the government) were not responded to by the government. Demand number 7 seeks matters constituting the fraudulent character of the sales which Mayer is alleged to have failed to disclose. Neither the indictment [D. App. 8-22] nor paragraph 3 of the government's bill

[D. App. 130, 131] disclose which matters were allegedly known by Mayer, and either fraudulently misstated or concealed by him. The government was unable to find any part of its bill which was responsive to demand 10 and simply refers back to the indictment on this demand [G. App. 3a, ¶10].

With respect to the Court's finding that certain of Mayer's unanswered demands were improperly interposed, there is error there also. Mayer's demand number 5 [D. App. 126, ¶5] seeks the name of the person who allegedly gave $20,000.00 to Mayer as alleged in Count I, paragraph IV(2) of the indictment [D. App. 11]. The government's bill contains no response to this item, and the government defends its failure to respond on the hyper-technical ground that the indictment alleges that $20,000.00 was "to be" secretly paid to Mayer and does not allege that such monies "were" actually paid [G. App. 3a, ¶5]. No such overly scrupulous technical niceities prevented the government at trial from putting two witnesses on the stand (Rafalowicz and M. Lichtman) who testified that the $20,000.00 had, in fact, been paid to Mayer [G. Br. 6]. No such hyper-technical objection to Mayer's demand for particulars should have been recognized by the District Judge in relation to such an essential element of the government's charges.

(2) Mayer Consistently Maintained That He Had Not Received A Proper Bill of Particulars

The government goes to great lengths, at pages 13, 15 and 22 of its brief, to establish a minor inconsistency between the contentions of Mayer's counsel in a March 17, 1976 letter [G. App. 6a] and a September 20, 1976 letter [G. App. 4a] as to how many items of the government's bill of particulars could be considered responsive to defendant Mayer's demand for particulars. This is merely an elaborate attempt to obscure the real meaning of the March 17, 1976 letter. The context in which the March 17, 1976 letter was written was as follows. In September, 1975, Mayer's counsel had made a motion for particulars, and had received no opposing papers. In October, 1975 a bill of particulars was received which was evidently not prepared in response to his motion but which contained a very limited number of items relating to those he had demanded. In the prolonged absence of any response to his papers by either the government or the Court, Mayer's counsel undertook to press the government, by means of both telephone conversations and a March 8, 1976 meeting (which are explicitly referred to in the March 17, 1976 letter, [G. App. 6a]) to provide the particulars sought by Mayer's demand. Moreover, the government, in its brief, fails to disclose that it never responded

to counsel's informal overtures in the March 17, 1976 letter and a subsequent March 31, 1976 letter.

Instead the government, on May 11, 1976, filed a memorandum of law containing a two sentence opposition to Mayer's motion for particulars. [D. Br. 10]. To lay to rest the government's misleading assertion of the character of the March 17, 1976 letter, the table below sets out the items of Mayer's demand for particulars which were being pressed in that letter:

Item of Mayer's Demand [D. App. 126]	Treatment in March 17, 1976 Letter [G. App. 6a]
1.	Partially answered - request for names and addresses renewed in ¶1 of letter.
2.	Unanswered - request renewed in ¶2 of letter.
3.	Unanswered - request renewed in ¶3 of letter.
4.	Unanswered - request renewed in ¶4 of letter.
5.	Unanswered - request renewed in ¶5 of letter.
6.	Substantially answered by ¶3 of government's bill - not mentioned in letter.
7.	Unanswered - request renewed in ¶6 of letter.
8.	Substantially answered by ¶3 of government's bill - not mentioned in letter.

9.	Substantially answered by ¶3 of government's bill - not mentioned in letter.
10.	Unanswered - request renewed in ¶7 of letter.
11.	Unanswered - request renewed in ¶8 of letter.
12.	Unanswered - request renewed in ¶7 of letter.

(3) Mayer's Counsel Continued to Press For Particulars

Contrary to the government's contention, [G. Br. 23] it was the government, not Mayer, which "chose to sit back and await further developments" rather than deal with outstanding motions for particulars. As the March 17, 1976 letter [G. App. 6a] shows in its opening paragraphs, Mayer's counsel sought, by telephone calls, a meeting and correspondence,to stir the government into action on his demand for particulars but neither this letter nor the prodding of the Court below was successful. The government took no action until May, 1976. The government's transparent attempt to shift the blame for its own lethargy in handling this case to Mayer's counsel is ludicrous.

POINT IV

THE DELAY OF TRIAL CAUSED BY THE GOVERNMENT'S DEFAULT ON MAYER'S MOTION FOR PARTICULARS VIOLATED RULE 5 REGARDLESS OF WHETHER MAYER RECEIVED OR WAS ENTITLED TO SUBSTANTIVE RELIEF ON THE MOTION

With remarkable understatement, the government acknowledges its seven month default in answering Mayer's motion for particulars [G. Br. 23] by stating that "the Government should have been more alert and prompt with respect to Mayer's motion." Having admitted its default, the government then tries, adroitly, to sidestep its effect by arguing that the Court's hands were not tied, because the Court could have granted Mayer's motion by default. This argument studiously ignores the record of this action.

The government's observation [G. Br. 23] that it is "unrealistic" to believe that the government could tie the hands of the District Court and delay trial is directly contradicted by the plain words of the District Judge as to what actually happened here:

> Yes - but - I don't want to interrupt you [Assistant Timbers] but you were informed by my office that we could not set a trial date in this case - you were asking to have a trial date set back in January or February - until these outstanding motions had been decided and that we could not decide them on just one set of papers, and here we are in the middle of May.
>
> [D. App. 35]

That the Court below in fact decided that the government's rights on Mayer's motion were too important to be decided on simply one set of papers is a direct refutation of the government's effort to excuse the delay of trial caused by its seven month default in

supplying those papers.

In any event, the government's argument ignores the most basic feature of Rule 5, which is that it "focuses on the prosecutor's responsibility to bring his cases to trial", United States v. Salzmann, 548 F. 2d 395, 400 (2d Cir. 1976). Neither delay by the Court nor lack of diligent preparation by the defendant are the concern of Rule 5, which was enacted to remedy the "creeping, paralytic, procedural delays" which destroy public confidence in the judicial system. Hilbert v. Dooling, 476 F. 2d 355, 357 (2d Cir. 1973).

The government's citation of United States v. Pollak, 364 F. Supp. 1047, 1050, to support its contention that Mayer had and failed to pursue procedural remedies is inapposite. In the Pollak case the government had defaulted in complying with an order to provide a bill of particulars. The Pollak court found that the defendant possessed, but had not pursued, a whole panoply of remedies under Rules 48 and 16 of the Federal Rules of Criminal Procedure for violation of an order.

Here there was no remedy known to Mayer's counsel for the government's failure to respond to a motion. The government certainly points to none. Mayer's counsel took the only apparent course available to him, seeking to prod the government into acting by telephone calls, meetings, and letters.

POINT V

PROSECUTOR MacDONALD CLEARLY PROMISED TO PROVIDE COMPLETE DISCOVERY TO MAYER

In defense of its failure to provide defendant Mayer with all the discovery materials to which he was entitled within Rule 5's six-month period, the government asserts, [G. Br. 23,24], that Mayer's argument, grounded on the promises of Assistant MacDonald to voluntarily provide all discovery which Mayer could obtain under Rule 16, was properly rejected by the District Court because statements and actions in the record by Mayer's counsel are inconsistent with the existence of such a promise by Assistant MacDonald. This is not so.

The government's first purported "contradiction" [G. Br. 24] is the isolated, out-of-context phrase "schedule of requested items" drawn from a May 13, 1975 letter of Mayer's counsel, [D. App. 159], to which the government conveniently neglects to provide a record reference. The sentence in which that phrase appears is as follows:

> Mr. MacDonald has indicated informally that all pretrial discovery items and a bill of particulars will be supplied by him voluntarily without the necessity of any motion, and I have confirmed this arrangement to him in writing by my letter of May 5, 1975, containing a schedule of requested items.
>
> (emphasis added)

The May 5, 1975 letter, [D. App. 154], to which the May 13, 1975 letter refers, qualifies the nature of this "schedule", even further referring to the schedule as "preliminary", "not necessarily exhaustive" and as consisting of items "which I think it would be

helpful for me to set down on paper at this time."

As its other purported inconsistency, the government argues that Mayer's "belated claim" that he had not received the full discovery promised him was inconsistent with his "longstanding failure to seek relief from the District Court at an earlier point", [G. Br. 24]. This argument must fall because there is no "belated claim" or "longstanding failure to seek relief" on this record. Mayer's complaints were raised formally by his motion of May 25, 1976 [D. App. 52-55]. To suggest that Mayer should have raised this matter earlier is to ignore the insidious nature of the assurances which the government had given Mayer. Assistant MacDonald represented to Mayer's counsel, in August, 1975, that all discoverable matter in the government's files had been turned over to Mayer [D. App. 53], and Mayer relied on this representation completely. It was only in March, 1976, in the course of attempting to obtain particulars in response to Mayer's still unanswered motion, that Mayer's counsel learned from Assistant Timbers of the existence of other undisclosed discovery material. This material, when finally made available by Assistant Timbers in late April, 1976, proved, as the District Judge later found, [D. App. 96], that Assistant MacDonald had not disclosed all discoverable material in the government files. Mayer's motion with regard to discovery followed promptly upon the receipt of copies of these new discovery documents from Assistant Timbers on May 14, 1976.

The government's ploy with respect to its "offer" to provide a further affidavit by MacDonald [G. Br. 24] is meaningless. If Assistant MacDonald had anything substantial to add to this question, the government could have, and should have, submitted his affidavit. Its failure to do so, as with a failure to produce a witness, permits the inference that Assistant MacDonald's affidavit would have been consistent with Mayer's version of the facts [McCormick on Evidence, (2d ed. 1972) Ch. 26, p.656].

There are no inconsistencies in this record with respect to the representations made by Assistant MacDonald about the discovery which he provided to Mayer, and the conduct of Mayer's counsel is thoroughly consistent with good faith reliance on Assistant MacDonald's representations.

POINT VI

RULE 5 REQUIRES THE GOVERNMENT TO COMPLETE ITS DISCOVERY OBLIGATIONS WITHIN THE SIX-MONTH PERIOD WHERE DISCOVERY HAS BEEN TIMELY SOUGHT BY DEFENDANT

As its last stand, [G. Br. 25-28], the government retreats to an argument that it has no obligation under Rule 5 to complete its discovery obligations within the six-month period of Rule 5. The Judge below clearly read Rule 5 to require that the government complete discovery in response to all timely motions and requests as part of its Rule 5 readiness obligation, as is evidenced by his prior decision in United States v. Blauner, 337 F. Supp. 1383, 1388 (S.D.N.Y., 1971) and his own statements on the record of this action:

> it [the MacDonald affidavit, R-23] shows that the government had done little or nothing to fulfill its obligations to provide discovery for the defendants, and I don't consider that the government is ready for trial until it has performed all of its obligations with respect to timely motions.
>
> [R 98, page 9]

In so reading Rule 5, the District Judge was in step with other district judges in this circuit. Considering this question in United States v. Gonzalez, 389 F. Supp. 471 (E.D.N.Y. 1975), Judge Platt held that a bill of particulars supplied after the filing of a notice of readiness, but within the six-month period, satisfied Rule 4 of the Second Circuit Rules, (the predecessor of Rule 5):

> The Second Circuit has held that the

> six-month rule is satisfied, as here, even when the completion of discovery follows the filing of a notice of readiness as long as discovery has been completed within the six-month period. United States v. Strayhorn, 471 F. 2d 661, 667 (2d Cir. 1972).

389 F. Supp. at 475. (emphasis supplied)

The decisions of this Court cited by the government are not to the contrary. In United States v. Strayhorn, 471 F. 2d 661 (2d Cir. 1972) the defendant claimed that the six-month requirement of the then-controlling Second Circuit Rules had been violated by the fact that the government did not fully comply with a discovery order until after it had filed its notice of readiness. The Court held that the six-month readiness requirement had been satisfied since the discovery order had been complied with within the six-month period. The clear and unquestioned implication of Strayhorn is that this Court considers the completion of discovery by the government as to timely demands to be one element of the government's readiness obligations imposed by the six-month rule.

United States v. Armedo-Sarmiento, 545 F. 2d 785 (2d Cir. 1976), also cited by the government, only reinforces this conclusion. There, as an alternative ground of decision, this Court held, citing United States v. Strayhorn, supra, that the six-month rule had been satisfied when translations of tape recordings were supplied to defendants after the filing of a notice of readiness but within the six-month period.

United States v. Pollak, 474 F. 2d 828 (2d Cir. 1973) also

fails to support the government's argument in this case. There, this Court remanded for further findings on a motion to dismiss which alleged failure by the government to comply with a pretrial discovery order within the six-month period. On remand, the district court again denied the motion to dismiss, on the ground that the government had in fact complied with the discovery order.

> The Government had informed defendant's counsel that the documents in question were available for copying and inspection. Defendant's counsel although aware of the availability of the documents never attempted to make an inspection.
>
> 364 F. Supp. at 1050.

In dicta the Pollak court noted the availability of Rule 16(g) of the Federal Rules of Criminal Procedure as a remedy for failure of the government to comply with a discovery order.

The distinction between this case and the Pollak situation is manifest. In Pollak the government allegedly failed to comply with a discovery order, a default for which a clear procedural remedy was available to the defendant. Here the government short-circuited the obtaining of an enforceable order by inducing the defendant to drop his discovery motion in reliance on a representation that all discoverable documents had been disclosed. When, months later, it became apparent that the government's representations on which Mayer had relied were false, the normal discovery remedies were not available and defendant Mayer had been greatly prejudiced by operating for months under the assumption that he had seen all of the

government's discoverable documents, and that such documents were extremely limited in extent. In such circumstances, the rationale of Pollak has no application.

As a last gasp, the government parades a collection of hypothetical horrors which would supposedly result from a holding here that the government's failure to provide Mayer with discovery violated Rule 5 [G. Br. 28]. These imagined problems simply have no relation to the facts of this case on which the Court is being asked to rule. As indicated above, the sanctions for failure to provide discovery available in the Pollak case were unavailable here. Mayer makes no proposal that the government be automatically considered unready if a discovery motion is filed subsequent to the filing of a notice of readiness, as the government's brief suggests.

Nor was there any danger here that providing discovery to Mayer substantially in advance of trial would lead to obstruction of justice or threats to witnesses. Defendant Mayer has no prior criminal record. [R 60, page 4] Nor has he been sanctioned by any administrative agency prior to the Minute Approved Credit Plan underwriting [R 60, page 2]. Finally, the government's concerns dealing with the disclosure of evidence relate to a situation which, by virtue of the Speedy Trial Act, no longer exists, and any ruling here poses no threat whatsoever to the future administration of justice in this Circuit.

If the government is ready for trial, compliance with a defendant's discovery requests should pose no added burden on the govern-

ment. On the other hand, the government's inability to complete its discovery obligations within the six-month period is symptomatic of the government's overall unpreparedness for trial. Completion of discovery obligations goes hand in hand with the purpose of Rule 5 in ensuring that any delay of trial beyond the six-month period is not attributable to the prosecutor.

CONCLUSION

The judgment of conviction of defendant Mayer should be reversed, and the indictment against him dismissed because the government was not ready for trial within the six-month period imposed by Rule 5 of the Southern District Plan for Prompt Disposition of Criminal Cases.

Dated: New York, New York
May 4, 1977

Respectfully submitted,

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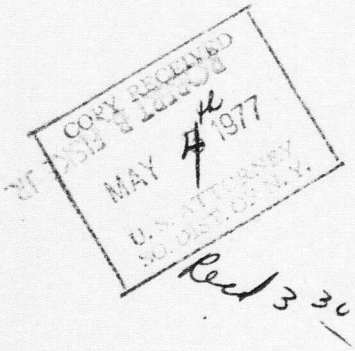
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